APPEAL NO. 010393

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 30, 2001. With regard to the disputed issues, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on May 22, 2000, and that the claimant's impairment rating (IR) is 28% as assessed by a referral doctor.

The appellant (carrier) appealed, arguing that one of the designated doctor's, Dr. L, reports should be used; that Dr. L had corrected an incorrect report; and that the corrected report of an 8% IR and an MMI date of November 3, 1998, should be adopted. The claimant responds, stating that the hearing officer's decision is correct and that, if the entire injury is rated, then by applying Dr. L's own figures, the claimant would have a 28% or 29% IR (our calculation indicates a 23% IR).

DECISION

Reversed and remanded.

The parties stipulated that the claimant "sustained a compensable injury on _____." Unfortunately, the "compensable injury" is neither stipulated nor otherwise defined. The medical reports seem to indicate that the injury involves the neck and shoulders, but the hearing officer, although commenting that one of the doctors "failed to properly rate all of the compensable body parts," fails to identify what those body parts are (apparently they include the cervical spine and shoulders). The parties (or at least the claimant) appear to agree that the last day the claimant worked was June 3, 1998, and that the statutory MMI date is June 5, 2000. If June 3, 1998, was the first day of disability, the earliest possible statutory MMI date would be June 8, 2000, 104 weeks after the 8th day of disability.

The claimant was seen by Dr. S, the carrier's independent medical examination doctor, who, in a report dated June 8, 1998, certified MMI on that date with a 3% IR, based essentially on right carpal tunnel syndrome sensory loss and cervical loss of range of motion (ROM). The hearing officer found that Dr. S's "certification was premature and can not be given any weight." Dr. W, the claimant's then treating doctor, in a Report of Medical Evaluation (TWCC-69) and narrative dated October 15, 1999, certified MMI on October 7, 1999 (incorrectly stating that that was "Statutory MMI"), and assessing a 41% IR. That IR was arrived at by a multitude of various ROM losses, rating each segment of both upper extremities as well as the cervical and thoracic spine. Even the claimant agrees that this evaluation is incorrect. The hearing officer comments that it "can not be given any weight" because it does not comply with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Either Dr. S or Dr. W's, or both, ratings were disputed and Dr. L was appointed as the designated doctor.

Dr. L, in a report dated November 3, 1998, certified MMI on that date and assessed a 7% IR, based entirely on loss of cervical ROM, using some fractions. Dr. L commented that he could not "find a specific disorder to fit." The claimant, through the Texas Workers' Compensation Commission (Commission), requested clarification and cited Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, for the proposition that spine charts do not provide for rounding up. The Commission sent Dr. L the claimant's questions and a copy of Appeal No. 980894 by letter dated November 4, 1999. Dr. L responded by letter dated November 8, 1999, stating, among other things, that Dr. S had not believed that the claimant should have a cervical rating under Table 49 of the AMA Guides "and I did not either"; that in the training courses that he had attended "interpolation was allowed"; and that:

> I am in no way, shape or form interested in becoming a party to a contentious dispute. If a different Designated Doctor would render the Board an opinion more to everyone's liking, then be my guest.

Dr. L concluded by saying that he would "comply with the concept of doing away with fractions [and] this would give an 8% [ROM] loss instead of 7%." The Commission again wrote Dr. L, by letter of May 1, 2000, asking "to have claimant's bi-lateral shoulders evaluated and rated, as well as to forward . . . medical evidence of [claimant's] cervical injury that was not available to [Dr. L] beforehand." Dr. L, in a TWCC-69 and narrative dated May 22, 2000, certified MMI on that date and assessed a 12% IR. Dr. L did repeat ROM testing and assessed the 12% IR on that testing. Dr. L went on to state:

> If, in fact, the board decides that [ROM] of the shoulder should be included, I am including that calculation for their benefit. A [ROM] loss in the right upper extremity based on today's examination would be 11% impairment of the upper extremity converting to 7% impairment of whole body.
>
> Loss of motion of the left upper extremity (i.e. shoulder) is 10% upper extremity, 6% whole person. I would not choose to add those to the impairment here, but the board certainly can act at its discretion.

Dr. L again commented:

> At the beginning of this evaluation, let the record reflect that I spoke to you approximately 10 days ago and suggested that there might be others more appropriate than myself to conduct a designated doctor evaluation on this patient.

The claimant was subsequently sent to Dr. C for an evaluation. Dr. C, in a report of September 19, 2000, assessed a 28% IR based on 6% impairment from Table 49, Section (II)(C); 9% impairment for cervical loss of ROM; 9% impairment for the right upper extremity; and 8% impairment for the left upper extremity combined for a 28% IR. Dr. C's

ratings are all supported by worksheets and step-by-step calculations; however, nowhere do we find a certification of MMI.

The hearing officer, in Finding of Fact No. 15, found that Dr. C "certified Claimant reached [MMI] on May 22, 2000 with a 28% [IR]" and accepted Dr. C's report as the "greater weight of the evidence" (Finding of Fact No. 17). Those findings, and the conclusions which they support, are not supported by the evidence because Dr. C failed to certify an MMI date. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). Further, "greater weight of the evidence" is not the standard set out in Sections 408.122 and 408.125. We remand the case back to the hearing officer for a finding of an MMI date that is supported by the evidence and correlates with an IR. The hearing officer should first define what the compensable injury is and follow the statutory standard granting presumptive weight to the designated doctor's report "unless the great weight of other medical evidence is to the contrary." As a possible solution, depending on the hearing officer's determination of what the injury is, the hearing officer may give presumptive weight to Dr. L's May 22, 2000, report, certifying MMI on that date, and adding to the IR the ROM ratings he provided for the right and left shoulders. Otherwise, the hearing officer must find an MMI certification and IR that is supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge